

TCEQ DOCKET NO. 2011-0050-WR

APPLICATION OF	§	BEFORE THE
FORT BEND COUNTY WCID NO. 1	§	TEXAS COMMISSION ON
WATER RIGHTS PERMIT	§	ENVIRONMENTAL QUALITY
NO. ADJ 5170A	§	

**GULF COAST WATER AUTHORITY’S REPLY TO
RESPONSES TO HEARING REQUEST**

TO THE HONORABLE COMMISSIONERS:

Gulf Coast Water Authority (“GCWA” or the “Authority”) files this Reply to the Responses to Hearing Request in the above-referenced matter, in reply to the responses filed by Fort Bend County Water Control and Improvement District No. 1 (the “District”) and the Executive Director (the “ED”) of the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”).

GCWA is an affected person. GCWA holds CA 11-5169 which, until 1986, was part of the water right the District now seeks to amend. The District asks for new diversion points, further downstream and closer to, and in fact on top of, the Authority’s diversion point, as well as a change in water use. Although the ED previously conceded that an interjacent diverter like GCWA is an affected person,¹ and, in this very case admitted that the Authority’s water right was impacted by the District’s amendment application,² albeit only minimally, the ED now asserts that to be “affected,” GCWA essentially must demonstrate in its hearing request the harm that would result from issuance of the amendment. THAT is not what the law requires.

I. Background.

A. Gulf Coast Water Authority.

GCWA is a political subdivision of the State of Texas, created in 1965 by the Texas Legislature. GCWA owns five water rights and has contracts for additional water supplies; it owns or has an interest in three canal systems that it uses to provide essential surface water to

¹ See ED’s Response to Hearing Requests, TCEQ Docket No. 2009-0356-WR at p.7-8 (Attachment A).

² TCEQ’s Interoffice Memorandum from Kathy Alexander, Surface Water Availability & Interstate Compacts Team, to Ron Ellis, Water Rights Permitting Team, regarding Fort Bend County W.C.I.D. No. 1, ADJ 5170, dated December 18, 2009.

municipalities, industrial petro-chemical industrial complexes and rice farmers in the area from south of Houston to the City of Galveston. GCWA has and continues to play an important role in abating subsidence and in providing reliable, affordable water that supports the economic engines of the region.

B. The District's Amendment Application.

There is a long history between the Authority and the District through their predecessors in interest American Canal Company and Imperial Sugar Company, respectively, regarding the operations of what is commonly referred to as "Canal A" and associated water rights. The "Canal A" system includes the dams, reservoirs and the water right at issue (the one held by the District) and GCWA's water right which is impacted by the District's proposed amendment.

In 1948 GCWA's predecessor (American Canal Company) and the District were jointly issued Water Permit No. 1467. The District owned the right to 18,000 acre-feet per year for a specific set of uses – municipal and industrial – and GCWA owned the right to 12,000 acre-feet per year *plus* the right to use any part of the 18,000 acre-feet of water authorized to be used by the District but not actually consumed by it in any year. (See Final Adjudication "Adj.", Conclusions 2-6). The Final Adjudication of Water Permit No. 1467 reflects the interrelationship of the Authority's and the District's interests as set forth in the permit and in a variety of longstanding contracts. (Adj. FOF 23). As a result of the adjudication, the rights originally contained solely in Permit 1467 and jointly owned by GCWA and the District were split into two certificates of adjudication (Certificate of Adjudication 11-5169 ("CA 11-5169") for GCWA's rights and Certificate of Adjudication 11-5170 ("CA 11-5170") for the District's rights.

At all times, the portions of Jones and Oyster Creeks associated with CA 11-5169 and CA 11-5170 have been an integral part of Canal A. This canal has, since 1937 in fact, been utilized by GCWA and its predecessors to transport Brazos River water to the industrial heartland of south Houston under water rights held by GCWA (including CA 12-5168, CA 12-5171 and, as of 1948, CA 11-5169) and contracts between GCWA and the BRA. Various other agreements between the Authority and the District address the operation of Canal A in the area where diversion points and facilities authorized under CA 11-5169 and CA 11-5170 are located.

The District's proposed amendment would (1) add diversion points downstream of currently authorized diversion points extending to reaches of Oyster Creek that overlap the location of the Authority's diversion points, and (2) add an additional, more consumptive use. These amendments impact GCWA's existing water rights, making GCWA an "affected person."

II. GCWA satisfied all the requirements to have its hearing request granted.

No party disputes that GCWA's hearing request was timely filed and is made pursuant to a right to hearing authorized by law. Tex. Water Code § 11.132(a), 11.134(b)(3)(B). The ED, however, incorrectly asserts that GCWA is not an "affected person," alleging it failed to satisfy 30 Tex. Admin. Code § 55.251(c)(2) and 30 Tex. Admin. Code § 55.256(c)(4)-(5). The District

takes issue with each of the five more particular objections stated in GCWA's hearing request, asserting that none demonstrate a justiciable interest.

The ED's position is, at best, confused. For example, the ED, itself, noted:

The Authority timely filed a hearing request stating that GCWA owns Certificate of Adjudication No. 11-5169 which authorizes impoundment of water in the same reservoirs authorized by Certificate of Adjudication No. 11-5170. . . . The Authority states that **it is an 'inter-adjacent diverter within the diversion reach requested by the applicant' and that the 'subject application directly impacts the reliability of GCWA's water rights.**

...

The Authority is a governmental entity with authority under state law over issues which may potentially be impacted by this application. Therefore, **GCWA is eligible for affected person status.** ED's Response at p. 4, 5 (emphasis added).

This text alone establishes that GCWA complied with 30 Tex. Admin. Code § 55.251(c)(2), which requires:

a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the activity in a manner not common to members of the general public.

The ED, however, inexplicably goes on to conclude that the Authority provided "no demonstration that any likely impact on GCWA's use of property or the impacted natural resource will result from this amendment," and that the above noted facts (and the five more particular objections to the District's amendment set out in GCWA's hearing request) are "insufficient to support a determination that GCWA has a personal justiciable interest not common to members of the general public." ED Response at p. 5.

The ED's stated position would require a hearing requestor to prove its case in order to get a hearing. THAT is not the law. *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 803 (Tex. App. – Austin 2000, pet. dismissed) (distinguishing the preliminary question of standing as an affected person to request a contested-case hearing from the ultimate question of whether that person will prevail on the merits); *HEAT v. West Dallas Coalition*, 962 S.W.2d 288, 295 (Tex. App. – Austin 1998, pet. denied); cf. *City of Waco v. TCEQ*, No. 03-09-00005-CV, 2010 Tex. App. LEXIS 7692 at *17-18, *43 (Sept. 17, 2010) (hearing request in a water quality case denied on record that established 85 miles of distance between requestor and any potential discharge and allegations of cumulative effect rather than impact from specific permit at issue). The Water Code plainly, and decidedly, does *not* require that a hearing request contain "competent evidence" related to its allegations, a requirement that was removed by the Legislature in 1999. Rather the requestor must identify a legal right, duty privilege, power or economic interest affected by the administrative hearing and it cannot be an interest merely common to the general public. Tex. Water Code § 5.115(a). The Authority met this standard.

The Authority holds legal rights – water rights – and its legal rights and economic interests are directly affected by the District’s amendment application. And, in fact, the likely impacts are paradigmatic examples of why, in addressing amendment requirements under Tex. Water Code § 11.122(b), the Texas Supreme Court noted that:

A hearing would be required, for example, if other water-rights holders or the on-stream environment were affected beyond or irrespective of the full-use assumption. For instance, if the amendment *moved the point of diversion* upstream above a senior right holder, it could affect that person’s diversion of water even if the applicant’s amount and rate of diversion were unchanged. Or if the use *changed from a nonconsumptive use to a consumptive one*, the amount returned to the stream would decrease and could affect downstream right holders, again irrespective of the full-use assumption or the rate of diversion. In situations like these, the Commission would be *required to provide notice and hearing*. *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 111 (Tex. 2006) (emphasis added).

In this case, firstly, on its face the District’s application asks for diversion points that are further downstream, capturing additional watershed that was previously dedicated to the Authority’s existing water right, CA 11-5169. This physical relationship between the District’s amendment and the Authority’s existing water right No. 11-5169, make it undeniable that there will be an impact on GCWA’s use of its property and the natural resource by reducing the reliability of GCWA’s existing right. This satisfies 30 Tex. Admin. Code § 55.256(c)(4)-(5). In addition, while demanding a “demonstration” in a hearing request is not supported by any rule or statute, to find a demonstration you need look no further than TCEQ’s Interoffice Memorandum, dated December 18, 2009, which states:

There is a very minimal impact on Certificate of Adjudication 12-5169 [sic] co-owner of the reservoir system, when both certificates divert from Reservoir 3. However, Certificates 12-5169 and 12-5170 both authorize diversion from the seven dams and system of reservoirs and staff is of the opinion that this does not constitute a practical impact on that water right.³

Secondly, CA 11-5169 authorizes the Authority to divert and use “any portion of the 18,000 acre-feet of water per annum allocated to the Fort Bend County W.C.I.D. No. 1, under Certificate of Adjudication 12-5170, that is *not actually consumed* by the District.” CA 11-5169, ¶ 2C (emphasis added). The “full use assumption” does not shield the District’s amendment in this circumstance. That assumption provides that a request:

shall be authorized if the requested change will not cause adverse impact on other water right holders . . . of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised *according to its terms and conditions as they existed*

³ That the staff baldly dismissed the unexplained impact as “minimal” is cold comfort to GCWA, the holder of that existing water right. Similar to the facts in *United Copper*, it is clear that GCWA will “be affected to some degree” and the dispute about the extent of that affect is the proper subject of the contested case. 17 S.W.3d at 803.

before the requested amendment.” Tex. Water Code § 11.122(b) (emphasis added).

The Authority’s existing right to take the water not consumed by the District is adversely impacted by authorizing agricultural use, because agricultural use is a more consumptive use than municipal or industrial use. Thus, if the amendment were granted, there would be an impact on GCWA’s existing water right of greater magnitude than if CA 11-5170 were fully exercised *according to its terms and conditions*. Further, the addition of agricultural use increases that likelihood that the District will actually consume the water. It has not otherwise been able to perfect its water right through its authorized uses for many years and could have been subject to cancellation. *See* 30 Tex. Admin. Code § 297.72. In this unusual circumstance where two rights are fully intertwined and the appropriation is not left on the table but already allocated as between two parties, materially changing the terms of the relative rights in favor of the District inappropriately threatens GCWA’s vested rights. Further, the Authority, in contrast to the public at large, is uniquely entitled under its water right to the District’s unused water. This alone makes the Authority an affected person entitled to the hearing it timely requested.

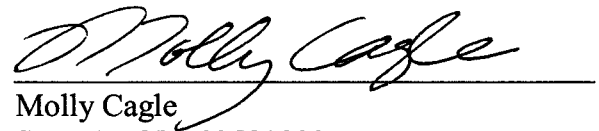
Thirdly, GCWA has senior water rights from the Brazos River that are conveyed (and have been continuously since at least 1937) through Canal A pursuant to vested rights and private agreements. The ED and the District doubt GCWA’s vested right to convey water through the Canal A system, but it is a right that existed prior to and survived adjudication and which has been continuously exercised for over 70 years.

III. Prayer.

Given that a hearing request for a water rights case must be made when the application is administratively complete (that is, at a point in time where there is no draft permit), the election by the District and the ED to dispute the particularities of certain examples articulated in the hearing request, rather than to acknowledge the plainly stated justiciable interest, is not merely confusing, but it is simply mistaken. 30 Tex. Admin. Code § 281.17(a), (e) (requiring only a notice of receipt of application for water rights applications); *see Chocolate Bayou v. Tex. Nat. Res. Conserv. Comm’n*, 124 S.W.3d 844, 850-51 (Tex. App. – Austin 2003) (if notice of application apprises that water right interests are at risk “concerns about the amendment should have been brought through a contested case hearing”). For the foregoing reasons, GCWA respectfully requests that the Commission recognize it is an “affected person” and grant its hearing request in the above referenced matter.

Respectfully submitted,

VINSON & ELKINS LLP

A handwritten signature in cursive script, reading "Molly Cagle", is written over a horizontal line.

Molly Cagle

State Bar No. 03591800

Paulina Williams

State Bar No. 24066295

**ATTORNEYS FOR GULF COAST
WATER AUTHORITY**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via hand delivery, facsimile, electronic mail, overnight mail, U.S. Mail, and/or Certified Mail, Return Receipt Requested, on all parties whose names appear on the attached mailing list on this the 11th day of April, 2011.

FOR APPLICANT:

Brad Castleberry
Lloyd Gosselink Blevins
816 Congress Avenue, Suite 1900
Austin, Texas 78701-2478
Tel: 512.322.5800
Fax: 512.472.0583

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512.239.4000
Fax: 512.239.4007

FOR THE EXECUTIVE DIRECTOR:

William Todd Galiga, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Section, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512.239.3578
Fax: 512.239.0606

FOR ALTERNATIVE DISPUTE RESOLUTION:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512.239.4010
Fax: 512.239.4015

Iliana Marie Delgado, Technical Staff
Ronald L. Ellis, Technical Staff
Texas Commission on Environmental Quality
WaTer Supply Division, MC-160
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512.239.3678
Fax: 512.239.0606

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512.239.3300
Fax: 512.239.3311

FOR PUBLIC INTEREST COUNSEL:

Blas J. Coy, Jr. Attorney
Texas Commission on Environmental Quality
Public Interest Counsel MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512.239.6363
Fax: 512.239.6377

GULF COAST WATER AUTHORITY

Ron Freeman

Freeman & Corbett

8500 Bluffstone Cove, Suite B-104

Austin, Texas 78759

Tel: 512.451.6689

Fax: 512.453.0865

Robert Istre

General Manager

Gulf Coast Water Authority

3630 Highway 1765

Texas City, TX 77591

Tel: 409.935.2438

Fax: 409.935.4156



Molly Cagle

TCEQ DOCKET NO. 2009-0356-WR

**APPLICATION OF GULF COAST
WATER AUTHORITY TO AMEND
CERTIFICATE OF ADJUDICATION
NO. 12-5322 BY ADDING A
DIVERSION POINT IN FORT BEND
COUNTY AND A REQUEST FOR AN
EXEMPT INTERBASIN TRANSFER
TO ADD GALVESTON COUNTY TO
ITS SERVICE AREA; APPLICATION
NO. 12-5322E.**

§
§
§
§
§
§
§
§
§

**BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

TO THE HONORABLE COMMISSIONERS:

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to hearing request for Gulf Coast Water Authority's (GCWA or Applicant) application to amend Certificate of Adjudication No. 12-5322. The Executive Director supports issuance of the permit if certain special conditions are included. The Executive Director received hearing requests on the application from Dow Chemical Company (Dow), NRG Texas Power, LLC or (NRG), Brazos River Authority (BRA), Terry Hlavinka/Terrance Hlavinka Cattle Co. (Hlavinka), Capt. Scott Hickman/ Circle H. Outfitters and Charters (Circle H), Anthony Duke, Jr. and Cindy Duke, Anthony and Carolyn Duke, and Ineos Olefins & Polymers (Ineos). Ineos subsequently withdrew its hearing request. The ED recommends approval of the hearing request from BRA and denial of the remaining six hearing requests.

I. BACKGROUND

The Application

Certificate of Adjudication No. 12-5322 authorizes Gulf Coast Water Authority to divert and use not to exceed 155,000 acre-feet of water per year at a maximum combined diversion rate of 900 cfs (405,000 gpm) from the Brazos River, Brazos River Basin, for municipal, industrial, and agricultural (irrigation) purposes within the owner's service area in Fort Bend, Brazoria, and Harris Counties in the Brazos River Basin, San Jacinto River Basin, and San Jacinto-Brazos Coastal Basin pursuant to an exempt interbasin transfer. The Time Priority for diversion and use from the currently authorized diversion point is: February 8, 1929, for the first 40,000 acre feet at 400 cfs; March 14, 1955, for the next 40,000 acre feet at 668 cfs; and July 25, 1983 for the remaining 75,000 acre feet of water at 900 cfs. Applicant seeks to amend the Certificate to add a diversion point approximately 3.9 miles upstream of the currently authorized point on the east bank of the Brazos River in Fort Bend County. This proposed diversion point is also currently authorized by Certificates of Adjudication No. 12-5168 and No. 12-5171, owned by Applicant, and Certificates of Adjudication No. 12-5166 and No. 12-5167, owned by the Brazos River Authority. The Time Priority for the Applicant's Certificate No. 12-5322 at the proposed diversion point would remain the same as the original diversion point except that it would be junior to interjacent water rights between the existing and proposed new diversion point as those rights existed on August 24, 2006. The only interjacent water rights of record are the aforementioned Certificates of Adjudication No. 12-5166 and No. 12-5167, both owned by the Brazos River Authority.

Applicant also seeks an exempt interbasin transfer pursuant to Texas Water Code §11.085(v)(3) to authorize Galveston County as a place of use within its authorized service area in the San Jacinto-Brazos Coastal Basin. Applicant is not requesting an increase in the diversion amount or the diversion rate.

The Executive Director has recommended approval of the draft permit amendment with the aforementioned time priority limitations (with respect to interjacent water right holder BRA) and with a special condition requiring the Applicant to submit and maintain a daily accounting plan before the Applicant may divert water at the new diversion point. If the Applicant does not submit an approved accounting plan before an amendment is issued in this proceeding, the Applicant would be required to file a new amendment application with a proposed accounting plan subject to notice and hearing before diversion at the new point would be allowed. The ED supports issuance of the permit if the special condition is included in the permit.

Procedural History

The previous owner of this water right, Chocolate Bayou Water Co., applied to the Commission to add an upstream diversion point many more miles upstream in 2004 (Docket No. 2004-1997-WR). The previous application was protested by some of the same water rights holders protesting this application, was referred to SOAH, and then subsequently withdrawn by the applicant (Dow, NRG, BRA – also GCWA, the applicant in this case, protested that application as well).

A new application was received from Chocolate Bayou on June 12, 2006 and declared administratively complete on August 24, 2006. Notice was mailed to BRA, the only Interjacent

Water Right Holder in the Brazos River Basin, on September 26, 2006. The deadline for comment and hearing requests ended on October 16, 2006. The Commission received hearing requests from Dow Chemical Company (Dow), NRG Texas Power, LLC or (NRG), Brazos River Authority (BRA), Terry Hlavinka/Terrance Hlavinka Cattle Co. (Hlavinka), Capt. Scott Hickman/ Circle H. Outfitters and Charters (Circle H), Anthony Duke, Jr. and Cindy Duke (Duke's1), Anthony and Carolyn Duke (Duke's2), and Ineos Olefins & Polymers (Ineos). Ineos subsequently withdrew its hearing request. The hearing requests submitted by NRG and Duke's1 were both untimely, but later became timely when the new applicant was required to re-notice the application.

GCWA was required to re-notice the application when it acquired the water rights (and the amendment application) from Chocolate Bayou. The second notice was mailed to BRA, the only Interjacent Water Right Holder in the Brazos River Basin, on September 25, 2007. The second comment period ended on October 15, 2007. No new requests for a hearing were received.

A public meeting was held in Angleton, Texas on January 25, 2007 and the Executive Director's Response to Comments (from both comment periods) was submitted to the Commission on July 17, 2008. Technical review for the application is complete.

II. RESPONSE TO HEARING REQUESTS

Legal Authority

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Texas

Administrative Code (TAC) Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the TAC require a hearing request to:

- (1) be in writing and be filed with the Office of the Chief Clerk during the public comment period;
- (2) give the name, address, and daytime telephone number of the person who files the request;
- (3) identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; and
- (4) request a contested case hearing.

A hearing request must comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 TEX. ADMIN. CODE § 55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:

- (A) complies with the requirements of 30 TEX. ADMIN. CODE § 55.251;
- (B) is timely filed; and
- (C) is pursuant to a right to hearing authorized by law

30 TEX. ADMIN. CODE § 55.255(b)(2).

An "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to the general public does not constitute a justiciable interest. 30 TEX. ADMIN. CODE § 55.256(a).

To determine whether a person is an affected person, all relevant factors must be considered, including but not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
 - (2) distance restrictions or other limitations imposed by law on the affected interest;
 - (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
 - (4) the likely impact of the regulated activity on the health, safety, and use of property of the person;
 - (5) the likely impact of the regulated activity on the use of the impacted natural resource by the person; and
 - (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.
- 30 TEX. ADMIN. CODE § 55.256(c).

Interbasin Transfer

A portion of the application at issue involves adding Galveston County as a place of use within the Applicant's authorized service area in the San Jacinto-Brazos Coastal Basin. This is an exempt interbasin transfer from a basin to its adjoining coastal basin pursuant to Texas Water Code §11.085(v)(3). The water code requires an application, but the exemption exempts the transfer from requirements of notice and hearing. However, the ED included the interbasin transfer in the notice to interjacent water right holder (BRA) because it was part of the same application to add an upstream diversion point. The ED does not recommend any parties be granted a hearing request based upon Gulf Coast Water Authority's request to add Galveston County to its service area. As a matter of law, any request for a hearing predicated on harm caused by this interbasin transfer should not be referred.

Hearing requests

BRA - INTERJACENT WR HOLDER

A timely hearing request was received from BRA on September 27, 2006. BRA has two water rights (Certificate of Adjudication Nos. 12-5166 and No. 12-5167) that share a diversion point that is coincident with GCWA's proposed diversion point in this application. This makes BRA interjacent to GCWA's proposed diversion point. The Commission's rules only require notice to interjacent WR holders when a request to add a diversion point is submitted. As such, BRA was the only party to receive notice in this matter. BRA states that one or more of its rights might be impaired by the granting of the application and that certain special conditions might protect BRA from any impairment. The Commission's past practice has been to allow interjacent water rights holders the opportunity to contest such an amendment and explain how their rights may be impacted. BRA's hearing request complied with all of the requirements of TEXAS ADMIN. CODE § 55.255. Additionally, an examination of the relevant factors under 30 TEX. ADMIN. CODE § 55.256(a) shows that BRA has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application that is not common to the general public. Specifically, the following factors support referral of BRA's request for a hearing:

Whether the interest claimed is protected by the law under which the application will be considered

BRA has a valid permit or certificate of adjudication which entitles it to use State water. The Commission will not grant an application if it would impair existing water rights or vested riparian rights. TWC §11.134(b)(3)(B). Further, a request for an amendment requires the

Commission to consider whether the requested change will “cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.” TWC §11.122. The proposed change could potentially affect Interjacent Water Right Holders by interrupting the water supply at the proposed diversion point to an extent that does not currently exist for BRA.

Whether a reasonable relationship exists between
the interest claimed and the activity regulated

Protecting the Interjacent Water Right Holders' water rights from impairment is reasonably related to the Commission's consideration of GCWA's water right amendment. As stated above, under TWC § 11.122, the Commission must consider protection of these water rights.

Whether there is a likely impact of the regulated
activity on the health, safety, and use of property of the person

The Interjacent Water Right Holders' existing water rights are property rights. The issuance of the GCWA amendment could impair those water rights.

Whether there is a likely impact of the regulated
activity on the use of the impacted natural resource

Granting this amendment could impact the Interjacent Protestants' ability to take this water under their current water rights.

For all of the aforementioned reasons, the Executive Director recommends referral of BRA's hearing request.

DOW - DOWNSTREAM WR HOLDER

A timely hearing request was received from Dow on October 16, 2006. Dow's hearing request complied with all of the requirements of TEXAS ADMIN. CODE § 55.255. Dow holds Certificate of Adjudication No. 12-5328. Dow's diversion points are located downstream of GCWA's existing and proposed diversion points. Despite the fact that the amendment will not change the authorized amount or rate of GCWA's diversions and that all of GCWA's diversions will remain upstream from Dow, Dow argues that the amendment could reduce the water available to it. Dow states that the usage patterns in Galveston County may differ and the interbasin transfer will reduce return flows that Dow might otherwise have access to.

Dow was a protestant in the previously withdrawn application by Chocolate Bayou to add an upstream diversion point (for the same permit now transferred to GCWA) (See Docket No. 2004-1997-WR). The Commission denied Dow's hearing request in that previous application², and should do so here as well.

First, Dow's arguments center on changes that would only occur due to the interbasin transfer. As was previously stated above, that interbasin transfer is exempt from notice and hearing requirements under Texas Water Code §11.085(v)(3). Second, a request for an amendment requires the Commission to only consider whether the requested change will "cause adverse impact on other water right holders or the environment on the stream of *greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.*" TWC §11.122. (emphasis added). The Commission must treat the applicant's right as if it was fully exercised. According to the terms of GCWA's permit, GCWA holds the right to divert a full 155,000 acre-feet of water

upstream of Dow. This fact will not change if the proposed amendment is granted - the relative rights and remedies between the parties will remain unchanged. Therefore, Dow cannot be harmed by the proposed amendment.

NRG - UPSTREAM WR HOLDER

NRG filed an untimely hearing request that became timely when the applicant was required to re-notice the application due to change in ownership of the underlying permit. Once the notice became timely, NRG's request complied with the requirements of 30 TEXAS ADMIN. CODE § 55.255. However, similar to a downstream water right holder, an upstream water right holder's legal rights and remedies relative to the applicant remain unchanged and therefore the upstream water right holder is also not affected.

NRG's water right no. 12-5320 is upstream of both the existing and proposed diversion points. The amendment will not change the amount or rate of GCWA's diversions and GCWA's diversions will remain downstream from NRG. NRG argues that it should be allowed to participate in the hearing to ensure that the amendment will account for the amounts of water to be taken at each diversion point and their relative priority dates to prevent GCWA from making an unwarranted call on the river.

NRG was a protestant in the previously withdrawn application by Chocolate Bayou to add an upstream diversion point (for the same permit now transferred to GCWA) (See Docket No. 2004-1997-WR). However, that application was to add a diversion point much further upstream, and which made NRG interjacent in that 2004 case. NRG's hearing request was approved by the Commission in the previous case, but should be denied in this matter since NRG is not interjacent to the existing and proposed diversion points.

A request for an amendment requires the Commission to only consider whether the requested change will “cause adverse impact on other water right holders or the environment on the stream *of greater magnitude than under circumstances in which the permit, certified filing, or certificate of adjudication that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment.*” TWC §11.122. (emphasis added). The Commission must treat the applicant's right as if it was fully exercised. According to the terms of GCWA's permit, GCWA holds the right to divert a full 155,000 acre-feet of water downstream of NRG. This fact will not change if the proposed amendment is granted - the relative rights and remedies between the parties will remain unchanged. Just like Dow's downstream rights, the relative rights and remedies between GCWA and NRG will remain unchanged. NRG's position will not change because NRG will still remain upstream from GCWA. Therefore, NRG cannot be harmed by the proposed amendment.

OTHER PROTESTANTS

Three of the four remaining protestants identified themselves as farmers. They are: Anthony Duke Jr. and Cindy Duke; Anthony and Carolyn Duke; and Terry Hlavinka. None of them named a certificate of adjudication owned by them; therefore, the ED assumes that they do not possess one. They each identified themselves as farmers who once purchased water from Chocolate Bayou Water Company, but none has indicated they have a long term contract with Chocolate Bayou or GCWA.

Mr. Hlavinka

Mr. Hlavinka states that as a farmer who purchases water from Chocolate Bayou, he is a stakeholder that wants to know more about the proposed transfer of water out of the current river basin. The Executive Director understands that Mr. Hlavinka is concerned about the application, however, Mr. Hlavinka's request should be denied. First, as previously discussed, the hearing request is predicated on the exempt interbasin transfer of water to Galveston County. Under 30 TEX. ADMIN. CODE § 55.256(a), a hearing request must be based on "an interest claimed that is protected by the law under which the application will be considered." Texas Water Code §11.085(v)(3) exempts the interbasin transfer from notice and hearing requirements. Therefore, the transfer should not be grounds for a hearing request in this matter.

Second, an "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to the general public does not constitute a justiciable interest. 30 TEX. ADMIN. CODE § 55.256(a). The Texas Water Code does not contemplate the protection of others unless they have a water right or other property right that can be affected by the amendment. Mr. Hlavinka does not own a water right, nor has he identified a contract that obligates GCWA or Chocolate Bayou to provide him water. Even if he could identify a contract, the Commission has denied hearing requests of contract holders in the past because they have no legally protected right that is being affected.

Anthony Duke Jr. and Cindy Duke
Anthony Duke and Carolyn Duke

The Dukes are concerned that they will no longer be able to purchase water from GCWA when the amendment is passed because they believe GCWA intends to sell the water now provided to farming customers in Fort Bend County to municipal customers in Galveston

County. While they do not provide a certificate of adjudication, they argue that they have acquired “equity rights” in Chocolate Bayou’s permit as longtime “beneficial users” or customers on the canal system.

The Executive Director understands the Dukes’ concern that they may no longer be able to purchase water from GCWA to use on their farms. However, as noted above, the interbasin transfer is exempt from Commission consideration pursuant to Texas Water Code §11.085(v)(3). These protests could be denied on this basis alone.

Assuming their protests could be construed to apply to the adding of the diversion point, the Commission has not granted status to customers of water rights holders in the past, especially ones that have not demonstrated that they have a contract. The protestants have not identified a right that is an interest claimed that is protected by the law under which the application will be considered. Under the Water Code, the Commission will not grant an application if it would impair existing water rights or vested riparian rights. TWC §11.134(b)(3)(B). The Protestants raise the issue of “equity rights” and cite to *State v. Hidalgo County Water Control. And Improvement District No. 18*, 443 S.W.2d 728 as their ‘protected’ right. The case cited is not relevant or applicable to the Dukes. The case’s scope was limited to a specific class of formerly recognized Spanish land grant riparian right claims in the lower Rio Grande Valley. A complicated ruling in *Hidalgo* resolved a problem caused when riparian water rights in the valley had been recognized for 30 years were voided in a later ruling. It was that 30 years of development of those rights combined with the construction of a dam during that time period that caused the court to issue an equitable relief to those specific claimants. See *In re the Adjudication of WATER RIGHTS OF the CIBOLO CREEK WATERSHED OF the SAN ANTONIO RIVER BASIN*, 568 S.W.2d 155 (Tex – App. 1978). The case has not been construed

to apply in the Brazos River basin. Furthermore, even if such a right could exist, it should have been adjudicated when all of the other water rights were adjudicated in the basin. The Commission has never made a determination regarding the Duke's claim for 'equity water rights' and this proceeding would not be the proper venue for that determination. Finally, the Commission has never recognized 'equity water rights' as a basis for standing in a water rights amendment application such as this.

Captain Scott Hickman - Circle H. Outfitters and Charters

The final requestor is Captain Scott Hickman - Circle H. Outfitters and Charters. He complains that the amendment may interfere with his commercial waterfowl hunting operation for which he leases many thousands of acres of land for hunting and bird watching. The Executive Director understands that Captain Hickman is concerned that the application may harm his hunting and bird watching operation, however, he does not state where his lands are in relation to the permit amendment or how the amendment could affect him. The request does not identify the person's personal justiciable interest affected by the application. It does not state the location and distance of the protestant's property to the activity that is the subject of the application. It merely states that he has thousands of acres of land leased for hunting and bird-watching, but does not state where these lands are in relation to the proposed diversion point. The request does not state how and why the requestor believes he will be affected by amendment in a manner not common to members of the general public. It does not state how the requestor would be affected at all. This request should be denied because it does not substantially comply with the minimum requirements of 30 TEX. ADMIN. CODE § 55.251(c).

III. CONCLUSIONS

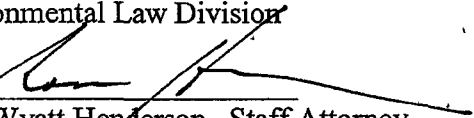
For the reasons stated above, the Executive Director recommends that BRA's hearing request be granted and that all other requests be denied.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

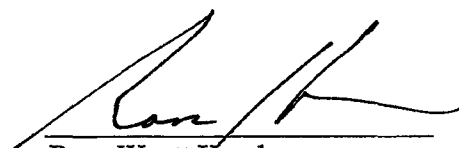
Mark R. Vickery, P.G., Executive Director

Robert Martinez, Director
Environmental Law Division

By 
Ross Wyatt Henderson, Staff Attorney
Environmental Law Division
State Bar of Texas No. 24046055
P.O. Box 13087; MC 173
Austin, Texas 78711-3087
Phone: (512) 239-6257

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2009, a true and correct copy of the foregoing document was sent by first class, agency mail and/or facsimile to the persons on the attached Mailing List.


Ross Wyatt Henderson